

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

)	
UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	
GELEAN MARK,)	
VERNON FAGAN, aka "Culture,")	Criminal No. 2005-76
ALLEN DINZEY, aka "Mow,")	
DAVE BLYDEN, aka "Kimbis,")	
KEITH FRANCOIS, aka "Kibo,")	
ALEXCI EMMANUEL,)	
ROYD THOMPSON, aka "Killer,")	
TYRONE ALEXANDER PRINCE, and)	
LEON BOODOO,)	
)	
Defendants.)	
_____)	

ORDER

GÓMEZ, C.J.

Before the Court is the motion of Gelean Mark ("Mark") to exclude the testimony of Elton Turnbull ("Turnbull") regarding Mark's alleged drug trafficking activities that predate the time in the Second Superseding Indictment (the "Indictment") within which the conspiracy is alleged to have occurred. Mark also moves to exclude items found during a search of his home.¹ Mark

¹ These items include a Kevlar Ballistic Vest, a video recording of Mark's residence, a compact disc containing digital photographs of Mark's residence, a digital video recorder, a scanning receiver, and a radio frequency guide.

argues that the introduction of such evidence would violate Federal Rule of Evidence 404(b) ("Rule 404(b)").²

Count One of the Second Superseding Indictment (the "Indictment") alleges that beginning from a time unknown, but no later than November, 2004, and continuing until November, 2005, Mark knowingly and intentionally conspired to possess with intent to distribute controlled substances. Count Eighteen of the Indictment alleges that, beginning from a time unknown, but no later than November, 2004, and continuing until November, 2005, Mark conspired to import controlled substances into the United States.

While the government provided notice of its intent to introduce evidence of Mark's alleged involvement in drug trafficking activities prior to the dates of the conspiracy alleged in the Indictment, the government argues that such notice

² Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

is not required because Rule 404(b) is not implicated. The Court agrees.

Rule 404(b) proscribes the admission of evidence of other crimes when offered to prove bad character. See Fed. R. Evid. 404(b) (2006). However, "Rule 404(b) does not extend to evidence of acts which are intrinsic to the charged offense." *United States v. Cross*, 308 F.3d 308, 320 (3d Cir.2002). "Even if such proof [of intrinsic acts] is extremely prejudicial to the defendant, the trial court would have no discretion to exclude it because it is proof of the ultimate issue in the case." *United States v. Bobb*, 471 F.3d 491, 497 (3d Cir. 2006) (citations and quotations omitted).

Here, Turnbull's testimony is "intrinsic" evidence used by the government in an attempt to directly prove Mark's participation in the charged drug trafficking conspiracy. See, e.g., *United States v. Males*, 715 F.2d 568, 571 (11th Cir. 1983) (holding that evidence of prior cocaine dealings between an informant and the defendant were not governed by Rule 404(b) since the evidence was not extrinsic to charged offenses). Accordingly, the government is not precluded from introducing Turnbull's testimony simply because it relates to conduct that predates the time period of the conspiracy alleged in the Indictment. See *United States v. Bello-Perez*, 977 F.2d 664 (1st

Cir. 1992) (holding that the fact that the indictment charged a conspiracy beginning at an "unknown date," "at the latest by August 1988" did not preclude evidence relating to events predating August of 1988); *United States v. Boyd*, 595 F.2d 120 (3d Cir. 1978) ("[T]he government . . . may establish the existence of a continuing core conspiracy which attracts different members at different times and which involves different sub-groups committing acts in furtherance of the overall plan.").

The physical evidence taken from Mark's home also falls outside the scope of Rule 404(b). None of the items found in Mark's home are in and of themselves evidence of "other crimes, wrongs, or acts." See Fed. R. Evid. 404(b) (proscribing the use of "other crimes, wrongs, or acts . . . to prove the character of a person"). The Court is not aware of anything in the record to suggest that the physical evidence in question was offered to prove any prior bad act unrelated to the conspiracy charged in the Indictment.

Because neither Turnbull's testimony nor the physical evidence recovered from Mark's home implicates 404(b); it is hereby

ORDERED that Mark's motion is **DENIED**.

Dated: March 28, 2007

_____/s/
CURTIS V. GÓMEZ
Chief Judge

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ATTEST:

WILFREDO F. MORALES
Clerk of the Court

By: _____/s/
Deputy Clerk

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